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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MARTHA MILLS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI

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October 12, 1983

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PETITION FOR CERTIORARI

The petitioner Martha Mills respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on July 14, 1982.

QUESTIONS PRESENTED

1. Whether the Judicial Council of the Seventh Circuit had authority to increase the maximum rates payable to appointed counsel under the Criminal Justice Act 18 U.S.C. § 3006A(d)(1), in the absence of a "minimum hourly scale established by a bar association for similar services rendered in the district."

2. Whether the recommendation of the Bar Association of the Seventh Federal Circuit to the Seventh Circuit Judicial Council

that the maximum rates payable under the Criminal Justice Act should be increased to \$45 per hour for out of court time and \$55 per hour for in court time was a "minimum hourly scale established by a bar association for similar services rendered in the district" as used in the Criminal Justice Act, 18 U.S.C. § 3006A(d)(1).

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OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The opinion of the United States District Court for the Northern District of Illinois is reported at 547 F. Supp. 116 (1982), and appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on July 14, 1982. This petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 3006A(d)(1):

Hourly rate. -- Any attorney appointed

pursuant to this section or a bar association or legal aid agency or community defender organization which has provided the appointed attorney shall, at the conclusion of the representation or any segment thereof, be compensated at a rate not exceeding \$30 per hour for time expended in court or before a United States magistrate and \$20 per hour for time reasonably expended out of court, or such other hourly rate, fixed by the Judicial Council of the circuit, not to exceed the minimum hourly scale established by a bar association for similar services rendered in the district. Such attorney shall be reimbursed for expenses reasonably incurred, including the costs of transcripts authorized by the United States magistrate or the court.

STATEMENT OF THE CASE

I. The Statute Herein

In 1970, Congress amended the Criminal Justice Act, 18 U.S.C. § 3006A(d)(1) (the "Act"), to increase the rates of compensation for counsel appointed to represent indigents in criminal cases. See Pub. L. No. 91-447, § 1, 84 Stat. 916 (1970), codified at 18 U.S.C. § 3006A(d)(1) (1976). The 1970 amendment, which specified rates of compensation at \$20.00 per hour for out-of-court time and \$30.00 per hour for in-court time, also empowered the Judicial Council of each circuit to fix other hourly rates, "not to exceed the minimum hourly scale established by a bar association for similar services rendered in the district." 18 U.S.C. § 3006A(d)(1).

II. Action by the Seventh Circuit Judicial Council

The Judicial Council of the Seventh Circuit met on December 18, 1981 and, acting on a recommendation of the Bar Association of the Seventh Federal Circuit, increased the maximum hourly rates payable under the Criminal Justice Act, 18 U.S.C. § 3006A(d)(1). The new maximum rates of \$45 per hour for out of court time and \$55 per hour to in court time were made applicable to work performed on or after January 1, 1982. R. 6 at 1; 9 at 3. No minimum fee scale other than the recommendation of the Seventh Circuit Bar Association was considered by the Judicial Council.

On December 23, 1981, the Chief Judge of the Seventh Circuit notified the

Director of the Administrative Office of the United States Courts of the action taken by the Judicial Council. App. 5. On December 29, 1981 the Director of the Administrative Office advised all chief Judges of the United States Courts of Appeals that because it was his belief that the Judicial Councils do not currently have the authority to increase the hourly rates of compensation, the Administrative Office would not approve any payments beyond the statutory rates "until such time as the legal authority of the Circuit Councils is clarified." App. 6.

III. The Voucher and Action by the Administrative Office

On January 8, 1982, the petitioner herein (and plaintiff below), Martha Mills, a panel attorney in the program

established by the Federal Defender Program in the Northern District of Illinois, was appointed pursuant to the CJA to represent Stanley Dobbs, a defendant entitled to representation in the case of United States v. Stanley Dobbs, 82 CR 0008 (N.D. Ill.). R. 1, ¶8.

At the conclusion of her representation of Dobbs, petitioner Mills submitted a claim for compensation according to the revised maximum fee rates. Specifically, on January 20, 1982, Mills submitted to United States Magistrate James T. Balog, before whom she had appeared, a CJA Form 20 claim for compensation. R. 1, ¶8. The claim in the amount of \$127.50 was computed at the \$45.00 and \$55.00 hourly rates and was approved by Magistrate Balog who, in turn, submitted it to the Administrative

Office for processing and payment. R. 1, ¶8.

The Administrative Office refused to pay plaintiff Mills' claim. R. 1, ¶10. On February 18, 1982, the Chief of the Audit Branch of the Administrative Office's Financial Management division sent Mills a check for \$65.00 and a letter stating:

It is the position of this office that we do not have the authority to reimburse attorneys for services provided defendants proceeding under the Criminal Justice Act in excess of those maximum hourly rates prescribed by the Act. We are bound by the statutory maximum of \$30 per hour for in-court service and \$20 per hour for out-of-court service as specified in 18 U.S.C. 3006A(d)(1).

The above referenced voucher, a copy of which is enclosed for your convenience, has been reduced to reflect the statutory maximum rates and we have limited our payment accordingly.

R. 6 at 3.

IV. The Lawsuit

On February 22, 1982, petitioner Mills filed a one count Complaint against the

United States, charging that its agent, the Administrative Office, wrongfully refused full payment of her claim. R.1. The Complaint also alleged, and the government did not deny, that her law firm's overhead substantially exceeds the statutorily specified rates. R. 1, ¶9.

Jurisdiction in the District Court was based on 28 U.S.C. § 1346(a)(2), providing jurisdiction of civil claims against the United States, not exceeding \$10,000 in amount, founded upon an Act of Congress.

After considering briefs on the parties' cross motions for summary judgment, the district court on September 10, 1982 granted defendant's motion for summary and denied plaintiff's cross motion. See Memorandum Opinion, 547 F. Supp. 116 (N.D. Ill. 1982); App. 2.

Plaintiff Mills appealed from that judgment. On July 14, 1983 the judgment was affirmed by the Court of Appeals on the ground that a minimum bar association fee scale was a necessary condition precedent to the authority of the Judicial Councils to amend the maximum CJA rates, and that the Seventh Circuit Bar Association's recommendation did not constitute such a fee scale within the meaning of the CJA. Judge Swygert dissented.

REASONS FOR GRANTING THE WRIT

The Issue In This Case Is An
Important One Affecting The
Administration of the Federal
Criminal Justice System. It
Has Not Been, But Should Be,
Decided By This Court

The practical issue in this case may very well be whether the Criminal Justice Act can continue to provide adequate representation to federal criminal

defendants, or will, because of inadequate rates of compensation, become an empty shell under which only the most inexperienced attorneys can afford to accept appointment.

Congress, in the 1970 amendments to the Criminal Justice Act, provided a mechanism whereby the judicial councils could amend the maximum hourly rates payable to appointed counsel under that Act. It did so by providing that appointed counsel should be compensated at a rate not exceeding \$30 per hour for time expended in court and \$20 per hour for time reasonably expended out of court, or "such other hourly rate, fixed by the Judicial Council of the Circuit, not to exceed the minimum hourly scale established by a bar association for similar services rendered in the

district." 1/

The Judicial Council of the Seventh Circuit, having determined that the current statutory rates were inadequate, increased the maximum rates under the Act. The courts below have held that the Judicial Council was without power to increase those rates, because after the holding of this Court in Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), no enforceable minimum hourly scale set by a bar association existed, and that in the absence of such a scale, the Judicial Council could not act.

The practical consequences of this holding may be immense. There is widespread agreement that the current statutory maximums under the Act are inadequate to provide continued representation of

1/ 18 U.S.C. § 3006A(d)(1).

high quality.^{2/} And the number of defendants - and attorneys - involved is sizable. According to the Administrative Office of the United States Courts, there were 43,500 appointments of counsel under the Act in the 12 months ended June 30, 1981; of that number, 20,600 persons were represented by private panel attorneys.^{3/} These attorneys

^{2/} In a letter to the Comptroller General, the Director of the Administrative Office, William Foley, took issue with a General Accounting Office (GAO) finding that only a few district courts did have a problem obtaining attorneys because of the hourly rates. The Director of the Administrative Office stated that in contrast his agency had data to indicate that the low rates were creating difficulties for courts in obtaining qualified attorneys. Appendix VIII to the Report of the Comptroller General to the Congress titled "Inconsistencies in Administering of the Criminal Justice Act", dated February 8, 1983. App. 7 to this petition.

^{3/} 1981 Annual Report of the Director of the Administrative Office of the United States Courts 166.

are being paid at the statutory rate which even the government concedes does not so much as cover overhead much less contribute toward compensation. R. 1, ¶ 9.^{4/}

^{4/} Recently, several courts affirmed the inadequacy of the \$20 and \$30 specified rates. For example, one judge pointed out that the \$20 per hour maximum for out-of-court work provides a disincentive for appointed counsel to perform their own investigatory work. *United States v. Decoster*, 624 F.2d 196, 279 n.80 (D.C. Cir. 1979) (Bazelon, J., dissenting, joined by Skelly Wright, C.J.). Another court determined that the State of Illinois system for compensating appointed counsel was unreasonable, unless it at least reimbursed for overhead and yielded something toward the lawyer's support. *People v. Johnson*, 87 Ill. 2d 98, 105, 429 N.E. 2d 497, 500 (1981).

A court in this district recently observed that since the 1970 increase to \$20 and \$30, "society -- including lawyers -- has experienced an inflation rate of 100%." *United States v. Quintero-Medina*, 489 F. Supp. 82, 84 (N.D. Ill. 1980). Indeed, the \$20/hour maximum rate for out-of-court work effective in February of 1971, was reduced in value by inflation to the equivalent of \$8.40 by January of 1982; the \$30/hour maximum for in-court work had been reduced in value to \$12.60 by that date. U.S. Dept. of Labor, Bureau of Labor Statistics, Consumer Price Index (Reg. V, March 23, 1982).

In the Criminal Justice Act, Congress sought to fulfill its obligations under the Sixth Amendment. As this Court has held on many occasions, every person, regardless of ability to pay, is entitled to the effective assistance of counsel. Gideon v. Wainwright, 372 U.S. 335 (1963); Avery v. Alabama, 308 U.S. 444 (1940); Powell v. Alabama, 287 U.S. 45 (1932).

The legislative history of the Criminal Justice Act of 1964 and of its 1970 amendments shows that Congress was aware both of the crucial link between adequate representation of the accused and reasonable compensation for the attorney, and of the fact that what is reasonable compensation for the attorney may vary with time and place. The rate amendment provision of the act responded to this concern

that an unalterable rate could make the Act unworkable. The issue in this case is whether the lower courts were correct in holding (a) that where no minimum hourly fee scale set by a bar association exists, the Judicial Council cannot act and (b) that no such fee scale existed in this case. The question in this case is whether that is the result that Congress intended.

Congress intended to provide
Reasonable Compensation to
Ensure Adequate Representation

The passage in 1964 of the original Criminal Justice Act was largely a culmination of the recommendations in the Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminals Justice (1963) - the Allen Committee Report.

The Committee noted in its Report that "a system that relies wholly on the uncompensated services of private attorneys on occasion imposes unconscionable burdens on particular lawyers." Allen Committee Report at 29. "Such a system also enhances the possibility that less than adequate representation will sometimes be provided the client." Id. The Committee based these conclusions on extensive testimony quoted in the Report. This testimony included, Report at 16, the "Resolution on Indigent Representation unanimously adopted by the Judicial Council of the Ninth Circuit:

"RESOLVED by the Council of the Circuit Judges for the Ninth Circuit, at a meeting held on December 12, 1962, that there is an urgent need for legislation which will establish a means whereby indigent persons who are accused of crime can have assigned

to them counsel who will be compensated for their time and effort on behalf of such persons, thus assuring to such indigent persons representation by counsel who are both able and experienced in the handling of the defense of accused person."

The Criminal Justice Act of 1964 provided maximum rates of compensation for court appointed counsel of \$15 per hour for time expended in court and \$10 per hour for time out of court. Four years' experience under the 1964 Act led to the introduction of Senate Bill 1461 to amend the act in various respects, including an increase in the rates of compensation. Amendment to the Criminal Justice Act of 1964: Hearings on S 1461 Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 91st Cong., 1st Sess (1969). Testimony adduced during the hearings indicated broad recognition of

the clearly non-compensatory nature of the rate provided in the 1964 Act and support for an increase. In the Dallin Oaks Report on the Criminal Justice Act in the Federal District Courts, commissioned by the Judicial Conference of the United States in the late 1960's it is noted that:

Lawyers' principal complaints and suggestions about the Criminal Justice Act concern the fact that the Criminal Justice Act fees are only a fraction (we estimate that they are 20 to 40 percent) of the amount charged by retained counsel. Judicial agreement is evidenced by the fact that the \$10 and \$15 maximum rates specified in the act have now become the normal and usual rates, being awarded in almost every case in all districts.

1969 Senate Hearings 271.

An early version of S. 1461 amended the \$10 and \$15 maximum rates to a maximum rate of \$20 per hour for time in or out of court. Senate Report 91-790 at 15. Addressing a question of the sufficiency of

that proposed rate, Chief Judge Hastie of the Third Circuit expressed a wish that the proposed increase in the fees be bigger and suggested that in the light of inflation the amendments were not putting the lawyer in any better position than he was in 1964. 1969 Senate Hearings 227.

The Dallin Oaks Report also emphasized the relationship between compensation and quality of representation in its comments on the desirability of providing for federal defender organizations as an alternative or supplement to appointment of private counsel. Noting that the appointed-counsel method works most fairly when the burden of accepting appointments is spread among most members of the district court bar, but that the difficulty with that plan is that many members lack

the experience to accept Criminal Justice Act appointments, the report concludes that:

It is no answer to say that inexperienced lawyers or those with free time do not consider criminal appointments at Criminal Justice Act rates a burden. Although such practitioners sometimes perform with distinction, for the most part their services are less valuable than their experienced and busy fellow lawyers. A plan that relies primarily on that fraction of the bar who are inexperienced or idle involves no problem of allocating the burden of representation because it eliminates the burden by lowering the quality of service to the point where even low rates are roughly compensatory for services rendered. This sort of arrangement, though it avoids inequities in the allocation of burden, should be rejected for reasons of quality.

1969 Senate Hearings 280.

S. 1461 as passed by the Senate provided for a maximum hourly rate of \$30 for time either in or out of court, more than doubling the maximum previously provided under the Act.

The Senate bill was then referred to the House of Representatives Committee on the Judiciary, which reported favorably on the bill, with some amendments. One of these amendments restored the distinction found in the 1964 Act between time expended in and out of court. It retained the Senate's \$30 hourly maximum for in court time, but reduced the hourly maximum for out of court time to \$20 per hour, providing, according to the House Report, an estimated savings of \$2 million. H.R. Report No. 91-1546 at 10 (1970). This same amendment for the first time introduced the provision, included in the Act as it finally became law, authorizing judicial councils to establish alternative maximums not to exceed the minimum hourly scale established by a bar association for

similar services rendered in the district.

The legislative history underlying this provision is sparse. However, the provision was clearly drafted to deal with the problem of great disparities between what might be termed the "going rates" in different parts of the country. The Committee Report itself states:

The committee realizes that these hourly rates may be well below those charged by privately retained counsel, or may, in fact, be above the minimum fee schedule in various sections of the country. Id.

The committee plainly had before it evidence that the "going rate" for legal services varied widely in different parts of the country, including the 1970 American Bar Association publication entitled "Minimum Fee Schedules" referred to in the Committee Report. There was clearly a concern that the reduction of the maximum

rates provided in the Senate bill could frustrate the goal of adequate representation in some parts of the country.

When the bill, as amended, was presented for a vote in the House of Representatives, several questions were asked about this new provision.

In response to a direct question as to why the Judicial Councils were to be allowed to amend the rates, Rep. Kastenmeier stated:

The other amendment is an exceptional provision, not to be generally used. It provides that the Judicial Council of the Circuit where literally the Criminal Justice Act is unworkable [without?] some sort of additional compensation, may fix a rate not more than the local bar association rate.

That, at I said, is an exceptional provision, but we regard it as a sort of safety valve for some cases to avoid an inequity and a disservice to the act.

116 Cong. Rec. 34812 (1970)

Rep. Biester, the author of the amendment, responded further to this question, stating:

This offers flexibility, and makes it possible to have a less frozen impact in some areas and offers the capacity for relief, both on the higher side and also on the lower side.

It should also be pointed out that the Judicial Council has the power under this language, and not a local bar association. The history with respect to the Judicial Council has shown it to be rather tight with respect to these fee figures.

I believe this flexibility is essential if we are to have a national act covering the practice of law in as many regions as this bill would cover." Id.

Three important points may be drawn from this history: (1) Congress was aware what Bar Association minimum fee schedules did not exist in every state; (2) this was to be a national act; (3) Congress placed its trust in the judicial councils, not in the bar associations.

That Congress was aware that bar association minimum fee schedules did not exist in every state is confirmed not only by the reference in the House Report to the ABA publication listing only 45 States as having minimum hourly rates for legal office work, but also by Rep. Kastenmeier's statement that the judicial council is "limited to minimum rate, if any, set by a bar association." 116 Cong. Rec. 34811 (1970) (emphasis added).

Rep. Biester, the author of the amendment, himself stated that this was to be a national act. The whole purpose of the amendment was to allow the judicial councils to adapt the maximum rates to local conditions. As Rep. (now Circuit Judge) Mikva stated:

"I believe the intention of the bill and the intention of the amendment is to see to it that the bill is neither a bonanza for some lawyers to get more than the going rate in that town, nor an empty shell which will not be used because the rates are below the going charge in those towns."

116 Cong. Rec. 34812 (1970)

It is irrational to impute to Congress an intention to make a national act dependent on the existence of bar association fee schedules which it knew did not exist in all jurisdictions.

The point that trust is put in the judicial councils, not in the bar associations, is made repeatedly:

By Rep. Kastenmeier: "Nothing in the legislation delegates the authority of Congress to determine rates of compensation to local bar associations. Rates of compensation and maximum amounts of compensation are to be fixed by the judicial council...."

116 Cong. Rec. 34811 (1970)

By Rep. Biester: "It should also be pointed out that the Judicial Council has the power under this language, and not a local bar association. The history with respect to the Judicial Council has shown it to be rather tight with respect to these fee figures."

Id. at 34812

By Rep. Mikva (a member of the Judiciary Subcommittee that handled the Bill): "By having it flexible, with standards, the rate is left to the judges, not to the bar association...." Id.

The intent of Congress in passing this amendment clearly had nothing to do with bar association minimum fee schedules as such; rather Congress' concern was that the maximum rates under the Criminal Justice Act not exceed the "going rate" for a given locality, while still allowing the Act to function to provide adequate representation. And it was on the judicial council, not on the bar associations, that Congress relied to make that determination.

Because of Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), there are now no traditional bar association minimum fee schedules. But Congress' concern in the CJA was not with such fee schedules; it was with the effective and economical provision of representation.

It thus provided for maximum hourly rates thought at that time sufficient to provide adequate representation in the "average" area, but added a mechanism to allow rates to be adjusted where necessary to implement the purposes of the Act.

If Any "Fee Scale" is Required
To Exist, the Bar Association
Recommendation in This Case
Was Sufficient

That Congress was not interested in minimum fee schedules as such shows that the phrase "not to exceed the minimum

hourly scale established by a bar association for similar services rendered in the district" was not a condition precedent to the power of the Judicial Councils to act. It also shows that the phrase should be interpreted broadly in accord with the familiar principle that statutes should be construed so as to be effective, See FTC v. Manager Retail Credit Co., 515 F. 2d 988 (D.C. Cir. 1975), and in a way that "bestows the benefits of the Act on those for whom it was chiefly intended." Ralpho v. Bell, 569 F. 2d 607, 608 (D.C. Cir. 1977).

When the Seventh Circuit Judicial Council acted to increase the maximum rate, it had before it a recommendation of the Seventh Circuit Bar Association. Mills v. U.S., 547 F. Supp. 116, (N.D. Ill. 1982).

The court below held that this recommendation could not be a "minimum hourly fee scale" because it was not a general fee schedule, (Slip opinion at 14, n. 6), and the phrase "minimum hourly scale" in the Criminal Justice Act referred only to general fee schedules. Not only is there no evidence for this narrow interpretation, it is belied by the fact that at the time the Criminal Justice Act amendments were passed some states had purely advisory schedules. Arnould & Corley, Fee Schedules Should Be Abolished, 57 A.B.A.J. 655 (1971).

The courts below have narrowly interpreted the fee adjustment provision of the Criminal Justice Act to require that a bar association minimum fee scale exist, though such scales did not exist in all

states when the amendments were passed. They have further interpreted the provision to require that such fee schedules must be mandatory (and thus illegal), although not all bar association fee scales existing when the Act was passed were mandatory. By this narrow construction, they have distorted Congress' intent and frustrated its purpose to provide adequate representation.

This Issue is One Peculiarly
Suited to Review by This Court
Because it is Intimately Involved
In the Federal Judicial System
and Because This Relationship
Produces Practical Difficulties
of Review in the Lower Courts

The issue in this case is not only an important one, it is one peculiarly suited to review by this court.

This Issue is Intimately
Involved in the Federal
Judicial System

The Criminal Justice Act is an integral part of the federal criminal justice system. Our adversary system can work only so long as each side is competently represented, and, as shown above, there is a link between fair compensation and adequate (competent) representation. The Criminal Justice Act, the vehicle designed by Congress to ensure that the adversarial balance is maintained, recognizes this link. Thus it is of prime importance to the federal courts that the Criminal Justice Act function as Congress intended.

The implementation of Sixth Amendment rights for indigent defendants is essentially a question of the administration of justice, and the administration of justice

is peculiarly the province of the courts. This was recognized by Congress when it first created the Judicial Councils in 1939. 53 Stat. 1223 (1939). See Chandler v. Judicial Council, 398 U.S. 74, 89 (1970) (Harlan, J., concurring).

Similarly, when Congress passed the Criminal Justice Act it entrusted the judiciary with its administration. For example, plans for furnishing representation are to be placed in operation "by each United States District Court, with the approval of the judicial council of the circuit." 18 U.S.C. § 3006A(a). Claims for compensation or reimbursement under the plan are made to the District Court. 18 U.S.C. § 3006A(4). Payment in excess of the normal maximums per representation may be made only when the district court

certifies that such payment is necessary to provide fair compensation and the chief judge of the circuit approves the payment. 18 U.S.C. § 3006A(d)(3). Where a Federal Public Defender Organization exists, the Federal Public Defender is appointed by the court of appeals of the circuit. 18 U.S.C. § 3006A(h)(2)(A). Community Defender Organizations may receive grants for certain purposes "to the extent approved by the Judicial Conference of the United States [.]". 18 U.S. § 3006A-(h)(2)(B). And the Judicial Conference may issue rules and regulations governing the operation of plans formulated under this section 18 U.S.C. § 3006(a)(i).

Whether these duties are administrative or judicial in nature (or perhaps

both) is an unanswered question.^{5/} But whether the judges in a particular instance are acting judicially or administratively does not change the fact that they are intimately involved with the operation of the Act. And that makes it extremely important that decisions about the Act be correct.

^{5/}The Judicial Conference has described the power under the criminal Justice Act vested in district court judges and chief circuit judges as a "non-delegable judicial function rather than administrative function." Report of the Committee on Court Administration at the Proceedings of the Judicial Conference of the United States, March 12-13, 1981 at 14. At least one Court of Appeals, on the other hand, has held that the district court's certification of fees under the Act is administrative rather than judicial, and thus not appealable. Matter of Baker, 693 F. 2d 925 (9th Cir. 1982).

The Relationship Between the
Judiciary and the CJA Produces
Problems Preventing Adequate
Review in the Lower Federal Courts

However, the judiciary's very authority for the administration of this Act distorts the normal process of adjudication in the lower federal courts and reduces the safeguards built into that system to ensure the correct resolution of legal issues. Judicial review of the actions of a judicial council poses problems, in practice if not in theory, simply because the judicial council is composed of the active circuit judges. 28 U.S.C. § 332. These judges may be reluctant to review, as a court, actions which they have taken as a judicial council. In this case, the court below was composed of one active Circuit Judge and two Senior Circuit Judges, none of whom had

participated in the Judicial Council action under review. Mills.v. U.S., Slip Op. at 2, n. 2.

Similarly, the active circuit judges of the Third Circuit recused themselves in In Re Imperial "400" National, Inc., 481 F. 2d 41 (1973), a case involving the propriety of a Judicial Council action taken pursuant to 18 U.S.C. § 332. Although recusal avoids the problem of "self-review," it poses other problems.

The structure of the lower federal courts provides certain institutional safeguards. The most obvious of these is the availability where appropriate of review by the entire Court of Appeals of a decision of a single panel -- review en banc. Another very real, if not so obvious, safeguard against error is the

very existence of multiple Courts of Appeals. These Court are not bound to follow the decisions of other Courts of Appeals, although they naturally accord them great respect. When two Courts of Appeals confront the same issue (in different cases), they may disagree. Where two such circuits disagree, it may be a reason for review for this Court. Less formally, an increased degree of scrutiny may be given to a question by the second (or third) court to consider it, if the panel's initial inclination is to disagree with the first Court of Appeals decision. In fact, at least one Court of Appeals (the Seventh Circuit) has a rule requiring that any panel decision that would create a conflict with the holding of another Court of Appeals be circulated to the full court

before publication, so that it may be considered for rehearing en banc. Circuit Rule 16(e), Seventh Circuit Court of Appeals.

These safeguards are reduced, however, in cases involving review of the actions of a Judicial Council. Rehearing en banc may be precluded. See In Re Imperial "400" National, Inc., 481 F. 2d 41, 57 (3d Cir. 1973), where the court refused rehearing en banc of a decision of a panel of three judges "imported" from other Circuits because all the regular members of the Court had recused themselves. The Court stated:

We believe the issues presented warrant rehearing in banc. Nevertheless, we have decided that we should adhere to our previous decision to recuse ourselves. We do so because we originally recused ourselves solely for appearance sake, and we would not want it to appear that we have changed our position as a result of the

opinion of the panel majority. Moreover, we are hopeful that the Supreme Court will see fit to review this important matter, especially since we are impelled to recuse ourselves from sitting in banc on these petitions.

The reluctance of circuit judges to sit in review of their own actions may even have a chilling effect on the willingness of the Judicial Councils to act under 18 U.S.C. § 3006A(d)(1) even where they regard such action as appropriate and necessary. Without action by the Judicial Councils, of course, the issue whether such action is authorized cannot be judicially reviewed.

In a letter to Mr. William Anderson, dated September 29, 1982, the Hon. Thomas J. McBride, Senior Judge of the United States District Court for the Eastern District of California and Chairman of the Criminal Justice Act Committee of the United States Judicial

Conference pointed out that the Seventh Circuit was not alone in considering amending the rate. He stated:

Moreover, Circuit Courts are getting restless under the pressure from their bar associations. As I am sure you are aware, the Seventh Circuit Council felt that they had the power to raise the rates under the provisions of the act. The action of that court was brought to issue in *Mills v. United States of America*, 82 C 1057 (United States District Court for the Northern District of Illinois, Eastern Division). Judge Flaum held that the Circuit Council lacked the power to take such action, but I am sure the case will be appealed. I know that both the Ninth Circuit and the Eighth Circuit are contemplating similar action to that of the Seventh Circuit on the chance that the *Mills* decision may be reversed on appeal.^{6/}

^{6/}This letter is Appendix IX to the Report of the Comptroller General to the Congress of the United States titled "Inconsistencies In Administration of the Criminal Justice Act" dated February 8, 1983. It was introduced into the record on appeal at the instance of the government.

To petitioner's knowledge, no other Judicial Council has as yet acted to increase the maximum CJA rates. This may be because they agree with the decision of the Court of Appeals in this case, or it may be because of a reluctance to review their own actions. But it is certain that if no other Council acts, no other Court of Appeals will hear this issue, and the normal error-correction mechanisms of the lower federal courts will be avoided.

The issue in this case is an important one involving the administration of criminal justice in the federal courts. It is entitled to be decided by a procedure at least equal to the procedure existing for review of other legal issues. Because the normal system of review in the lower federal courts has been distorted by the

very fact that the administration this Act has been entrusted to the judiciary, only review by this Court can provide that procedural equality.

Review by this Court is appropriate.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

Appendix

- Appendix 1 - Court of Appeals Opinion
- Appendix 2 - Judgment of the District Court
- Appendix 3 - Memorandum Opinion of the District Court
- Appendix 4 - 18 U.S.C. § 3006A(d)(1), (3), (4)
- Appendix 5 - December 23, 1981 Letter from Chief Judge of the Seventh Circuit to Director of the Administrative Office
- Appendix 6 - December 29, 1981 Memorandum from Director of the Administrative Office to All Chief Judges
- Appendix 7 - September 29, 1982 Letter from Director of the Administrative Office to Mr. William J. Anderson, Director, General Government Division United States General Accounting Office

In the
United States Court of Appeals
For the Seventh Circuit

No. 82-2583

MARTHA MILLS, *

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 82 C 1057—Joel M. Flaum, Judge.

ARGUED FEBRUARY 16, 1983—DECIDED JULY 14, 1983

Before COFFEY, *Circuit Judge*, and SWYGERT and FAIRCHILD, *Senior Circuit Judges*.

COFFEY, *Circuit Judge*. The issue on this appeal is whether the Criminal Justice Act of 1964, 18 U.S.C. section 3006A (1976), grants the Judicial Council of the Seventh Circuit the statutory authority to increase the maximum hourly fees payable to court appointed counsel in the absence of a local bar association minimum fee scale. The district court for the Northern District of Illinois found that the Judicial Council for the Seventh Circuit was without statutory authority to increase the maximum hourly fees. We affirm.

I.

The Criminal Justice Act of 1964, 18 U.S.C. section 3006A(d)(1), as amended by Congress in 1970, provides:

"Hourly rate.—Any attorney appointed pursuant to this section or a bar association or legal aid agency or community defender organization which has provided the appointed attorney shall, at the conclusion of the representation or any segment thereof, be compensated at a rate not exceeding \$30 per hour for time expended in court or before a United States magistrate and \$20 per hour for time reasonably expended out of court, or such other hourly rate, fixed by the Judicial Council of the circuit, not to exceed the minimum hourly scale established by a bar association for similar services rendered in the district. Such attorney shall be reimbursed for expenses reasonably incurred, including the costs of transcripts authorized by the United States magistrate or the court."

On December 18, 1981, the Judicial Council for the Seventh Circuit, acting on the recommendation of the Bar Association of the Seventh Federal Circuit,¹ voted to increase the maximum fees payable to attorneys appointed under the Criminal Justice Act in the Seventh Circuit from \$30 to \$55 per hour for time spent in court or before a magistrate and from \$20 to \$45 per hour for out-of-court time, with the increased hourly rates to apply to legal work performed after January 1, 1982.² At the time the Judicial Council voted to increase the hourly fees, there was no bar association minimum fee scale in effect in any of the federal judicial districts within the Seventh Judicial Circuit and none had been established subsequently.

¹ A copy of the Bar Association recommendation is not contained in the record.

² None of the panel members deciding the present appeal participated in the Judicial Council action under review.

The plaintiff Martha Mills, an attorney engaged in the private practice of law, was appointed pursuant to the Criminal Justice Act to represent a defendant in a criminal case in the district court for the Northern District of Illinois. At the conclusion of her representation of Dobbs, Attorney Mills submitted a bill for payment to the United States Magistrate in the amount of \$127.50, computed on the basis of the new \$55/45 per hour rate established by the Judicial Council. The Magistrate approved Mills' fee request, and the bill approved for payment was submitted to the Administrative Office of the United States Courts.

The Administrative Office refused to pay the full amount of Mills' fee request, stating in a letter:

"It is the position of this office that we do not have the authority to reimburse attorneys for services provided defendants proceeding under the Criminal Justice Act in excess of those maximum hourly rates prescribed by the Act. We are bound by the statutory maximum of \$30 per hour for in-court service and \$20 per hour for out-of-court service as specified in 18 U.S.C. 3006A(d)(1)."

Mills then filed suit in the district court seeking an order compelling the government to pay the \$127.50 bill for services computed on the new \$55/45 maximum hourly rates. Both the plaintiff and the defendant moved for summary judgment, and the court granted summary judgment in favor of the government, finding that in the absence of a bar association minimum fee scale, the Judicial Council was without statutory authority to increase the maximum hourly rates set forth in the Criminal Justice Act, 18 U.S.C. section 3006A(d)(1). The plaintiff Mills appeals from this determination.

II.

The Criminal Justice Act (CJA) as originally enacted in 1964 provided that attorneys be compensated at a rate not exceeding \$15 an hour for time spent in court and not

exceeding \$10 an hour for out-of-court time. In 1970, Congress amended the CJA by increasing the maximum hourly rates and by granting judicial councils the authority to set hourly rates "not to exceed the minimum hourly scale established by a bar association for similar services rendered in the district." Five years later, however, the Supreme Court in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) held that a minimum fee schedule promulgated and enforced by a bar association constitutes unlawful price fixing in violation of the Sherman Act. In the wake of the *Goldfarb* decision, minimum fee schedules have been abolished in the states encompassed within the Seventh Circuit. Therefore, the issue in this case is whether the Judicial Council for the Seventh Circuit had the authority to raise the hourly rates payable under the CJA to levels above those prescribed in the statute, in the absence of local bar association fee schedules.

A.

In interpreting a statute, we first look to the language of the statute itself. *Greyhound v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 330 (1978). Both parties in this lawsuit argue that the language "not to exceed the minimum hourly scale established by a bar association for similar services rendered in the district", is clear and ambiguous. However, the parties come to opposite conclusions as to what the "plain language" of the statute means. The plaintiff contends that the clear language of the statute demonstrates that a local bar association fee scale is not a condition precedent to a judicial council raising the hourly rates under the Criminal Justice Act. On the other hand, the defendant asserts that the clear language of the statute mandates an opposite conclusion, namely that before the Judicial Council could act to modify the hourly rates payable under the Act, a local bar association minimum hourly fee schedule must exist. While the statutory language does clearly state that if a bar association minimum fee scale exists, the judicial council may not set hourly rates higher than those provided in the bar

association schedule, we believe the *language of the statute itself* does not definitively answer the question presented in this case. Although we find more persuasive the defendant's argument that the statutory language contemplates the existence of a minimum fee schedule before the judicial council is empowered to raise or lower the hourly rates, we believe that the language of the statute requires interpretation.

Having determined that the language of the statute itself leaves something to be desired and fails to categorically set forth whether a judicial council is authorized to raise hourly rates under the CJA in the absence of a local bar association minimum fee schedule, we next turn to the legislative history of the Act. "When faced with two possible interpretations of a statute, it is appropriate for a court to rely on the legislative history of the statute." *United States v. Noe*, 634 F.2d 860 (5th Cir.), *cert. denied*, 454 U.S. 876 (1981).

The statutory language authorizing judicial councils to adjust the hourly rates payable under the Criminal Justice Act was added to the Act by the House Committee on the Judiciary. Generally, committee reports represent the most persuasive indicia of Congressional intent (with the exception, of course, of the language of the statute itself). *Housing Authority of Omaha v. U.S. Housing Authority*, 468 F.2d 1 (8th Cir. 1972), *cert. denied*, 410 U.S. 927 (1973); *United States v. Curtis-Nevada Mines, Inc.*, 611 F.2d 1277 (9th Cir. 1980). The Judiciary Committee's report stated in part:

"The Committee amendment accordingly authorizes judicial councils to establish alternative maximums not to exceed the minimum hourly scale established by a bar association for similar services rendered in the district. These could be set by the judicial council of the circuit where the \$30 and \$20 maximums are grossly disproportionate. By the same token, the reference to minimum rates set locally by bar associations should serve to remind judicial council that, in setting rates within the \$30 and \$20 max-

imums, lower local rates set by bar associations should be taken into account."

H.R. Rep. No. 1546, 91st Cong., 2nd Sess., *reprinted in* 1970 U.S. Code Cong. & Ad. News 3983, 3990. In urging the bill's passage in the House of Representatives, Representative Kastenmeier stated:

"Nothing in the legislation delegates the authority of Congress to determine rates of compensation to local bar associations. Rates of compensation and maximum amounts of compensation are to be fixed by the judicial councils *within maximums prescribed by Congress* If in a particular case the judicial council feels that the hourly maximums are inadequate, it is *nevertheless limited to minimum rate, if any, set by a bar association.*

"Comparably, where bar association minimums are lower than the \$30 to \$20 maximums, these bar association minimums should serve to remind the judicial council that in setting appropriate rates within the \$30 to \$20 maximums, the lower bar association rates are relevant."

116 Cong. Rec. 34811 (1970). In response to Kastenmeier's statements, Representative Gross asked, "Why do you set up \$30 an hour, \$20 an hour, and then turn around and say in the same breathe that the judicial council can change it if it wants to?" Representative Kastenmeier answered:

"The other amendment is an exceptional provision, not to be generally used. It provides that the Judicial Council of the Circuit, where literally the Criminal Justice Act is unworkable some sort of additional compensation, may fix a rate not more than the local bar association rate.

"That, as I said, is an exceptional provision, but we regard it as a sort of safety valve for some cases to avoid an inequity and disservice to the Act."

* * *

"Mr. Gross. Could not the bar association establish a minimum above the figure set forth in the bill? The minimums might well be higher than the figures set forth in the bill.

Mr. Kastenmeier. It could be higher, or it could be lower."

Id. at 34812.

The House Judiciary Committee Report quoted above contains language suggesting that the judicial council has authority only to set rates lower than those prescribed in the Act ("the reference to minimum rates set locally by bar associations should serve to remind judicial councils that, in setting rates *within* the \$30 and \$20 maximums, lower rates set by bar associations should be taken into account"). However, in this appeal the government has chosen not to argue this interpretation, and we believe this interpretation is belied by the remarks of Representative Kastenmeier, the floor manager of the bill, stating that the hourly rates established by a local bar association "could be higher, or . . . could be lower." Representative Kastenmeier's remarks are entitled to substantial weight since he acted as floor manager of the bill. *Pan Am World Airways, Inc. v. Civil Aeronautics Board*, 380 F.2d 770 (1967), *aff'd. sub nom. World Airways Inc. v. Pan Am World Airways, Inc.*, 391 U.S. 461 (1968); *N.L.R.B. v. Fruit and Vegetable Packers and Warehousemen, Local 760*, 337 U.S. 58 (1964) (sponsor of bill).

The legislative history of the Criminal Justice Act also demonstrates that Congress intended to retain ultimate control over the hourly rates payable under the Act. In introducing the legislation before the House of Representatives, Representative Kastenmeier clearly stated that "[n]othing in the legislation delegates the authority of Congress to determine rates of compensation to local bar associations. Rates of compensation are to be fixed by the judicial councils *within maximums prescribed by Congress*" (emphasis added). Moreover, the legislative history is equally clear that Congress intended to grant

judicial councils only limited authority to adjust the hourly rates set forth in the Act, and that this limited authority was to be exercised only within the framework of the local bar association minimum fee schedule. Representative Kastenmeier referred to the Act's grant of authority to adjust the hourly rates as "an exceptional provision, not to be generally used" and stated that, in adjusting the hourly rates, the judicial council is "nevertheless limited to minimum rates, if any, set by a bar association." The Judiciary Committee Report is similarly replete with references to local bar association minimum fee schedules as limitations on a judicial council's authority, stating that the hourly rates set by the judicial council were "not to exceed the minimum hourly scale established by a bar association" and that "in setting rates . . . local rates set by bar associations should be taken into account." Based on our review of the legislative history of the Criminal Justice Act, it is evident that Congress intended the discretion of a judicial council to be limited by a specific standard—the bar association minimum fee schedule—and that Congress presumed that such a fee schedule would exist before a judicial council would be authorized to increase or decrease the hourly rates.³

³ The dissent points out that Congress was aware, at the time of the proposed amendment to the CJA, that only 46 states had minimum fee schedules. We fail to understand how this information strengthens the dissent's position since it is our view that judicial councils are without authority under the CJA, to modify the compensation rates prescribed in that Act in any state lacking a minimum fee schedule.

In footnote 2 of his dissent, Judge Swygert takes issue with the above-mentioned lack of judicial council authority in the four states having no minimum fee schedules. He asserts that this is contrary to "the generally accepted principle that Congress normally intends that its laws shall operate uniformly throughout the nation so that the federal program will remain unimpaired." Dissent at 20 n.1, *quoting Reconstruction Finance Corp. v. Beaver County*, 328 U.S. 204, 209 (1945). This general principle is inapplicable to the present case, however, since Congress *itself* gave judicial councils the power to change the

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B.

Having determined that the legislative history of the Criminal Justice Act demonstrates that a judicial council has authority to raise or lower the minimum hourly rates only if a local bar association minimum fee schedule exists, it is also appropriate for us to consider: (1) rules of statutory construction; and (2) policy considerations weighing for or against a particular construction of the statute. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975). As noted above, it is clear from the legislative history that Congress delegated only *limited* authority to the judicial councils to adjust the hourly rates payable to attorneys under the CJA. The limitation imposed on the judicial council's authority was that any hourly rate was "not to exceed the minimum hourly scale established by a bar association for similar services rendered in the district." However, the Supreme Court's decision in the *Goldfarb* case has rendered inoperative this limiting provision dealing with bar association minimum fee schedules, since *Goldfarb* held that bar association minimum fee schedules (at least when not purely advisory) violate the Sherman Antitrust Act.

If we were to adopt the position advocated by the plaintiff in this case, judicial councils would be left with virtually unrestrained authority to increase or decrease the maximum hourly rates, without guidelines or standards. We believe such an interpretation of the statute is unwarranted.

First, it is a well-established principle of statutory construction that if the qualifying portion of a statute is

³ *continued*

"federal program" if certain conditions were met. The reimbursement amounts were not expected to remain uniform across the country. Therefore, the fact that judicial councils are without authority to change the reimbursement amount in the four states lacking minimum fee schedules is not contrary to the above-mentioned general principle of statutory interpretation.

rendered inoperative, such a holding should not serve to extend the scope of the authority which the statute grants. For example, the Supreme Court in *Davis v. Wallace*, 257 U.S. 478 (1922) stated that "[W]here an excepting provision in a statute is found unconstitutional, courts very generally hold that this does not work an enlargement of the scope or operation of other provisions with which that provision was enacted and which it was intended to qualify or restrain." In this case, the Act's "excepting provision" (reference to local bar association minimum fee schedules) has been rendered generally inoperative by the Supreme Court in *Goldfarb* and that holding certainly cannot serve to expand the scope of the limited authority granted to judicial councils by Congress. Similarly, this court in *Quinn v. Comm. of Internal Revenue*, 524 F.2d 617, 626 (7th Cir. 1975) recited that "when a section of a statute is declared void, the statute cannot be given effect as though the legislature had not enacted the conditions limiting its operation." See also *U.T. Inc. v. Brown*, 457 F. Supp. 163, 170 (W.D.N.C. 1978) ("it is a cardinal rule of construction that where an excepting clause or restriction is found unconstitutional the substantive provisions it qualifies cannot stand. The court will not assume that the legislative body would have enacted the ordinance without the exceptions, nor can the court determine how the substantive provisions of the ordinance might otherwise have been modified had it been known the exceptions would be found unconstitutional.")

This principle of statutory construction was applied by the United States Court of Appeals for the Fourth Circuit in *McCorkle v. United States*, 559 F.2d 1258 (4th Cir. 1977), in deciding an issue analogous to the one in this case. In *McCorkle*, the court considered language of a provision in the Federal Salary Act of 1967 which provided that salary recommendations by the President submitted to Congress will become effective "but only to the extent that" between the submittal and the effective date no other rate has been enacted into law and/or neither House of Congress has enacted legislation disapproving

of the presidential salary recommendations. The court concluded that if the provision, in effect enabling one House of Congress to veto a presidential recommendation, was unconstitutional, the President would not have the authority to establish salaries pursuant to that section of the Federal Salary Act in question. In explaining this conclusion, the court stated: "when the questioned clause restricts a power granted by the Legislature, the case against severance is strong. *Otherwise the scope of the power would be enlarged beyond the Legislature's intent.*" 559 F.2d at 1261 (emphasis added). The "not to exceed" language of the Criminal Justice Act is analogous to the "but only to the extent" language in question in *McCorkle* since both are intended to act as a strict limitation on a delegation of Congress' authority to another branch of government. Here, as in *McCorkle*, Congress placed a limit on the power granted and the invalidity of the standard imposed (bar association minimum fee schedules) cannot serve to expand the scope of the power granted, and cannot defeat Congress' intent in setting a specific limitation on a judicial council's authority to adjust the hourly rates.⁴

⁴ Judge Swygert states in footnote 2 of his dissent that he need not reach the preceding question of severability because he finds the *Goldfarb* mandate inapplicable to the CJA. His position seems to be that a purely advisory fee schedule would satisfy the Act. He then continues to question the requirement of an established fee schedule like that found in *Goldfarb* in the paragraph immediately following footnote 2 of his dissent. While we do not decide whether a purely advisory fee schedule would be an adequate predicate for action by a judicial council under section 3006A(d)(1) because we do not believe the Seventh Circuit Bar Association's recommendation to the Judicial Council falls within the meaning of "minimum hourly scale" as set forth in the Act, *see infra* footnote 6, we believe some response to the dissent's argument is required.

In *Torti v. United States*, 249 F.2d 623 (7th Cir. 1957) this Court stated:

"Where words are susceptible of several meanings, the court is at liberty to determine from the legislative history

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⁴ *continued*

and surrounding circumstances the sense in which the words were used in the statute."

Id. at 625, quoting *Gellman v. United States*, 235 F.2d 87, 93 (8th Cir. 1956). At the time of the proposed amendment to the CJA in 1970, as was true in the factual scenario facing the Supreme Court in *Goldfarb* in 1975, the practice of habitually charging "fees less than those established in suggested or recommended minimum fee schedules . . ." was considered evidence of unethical conduct. Opinion 302 of the Professional Ethics Committee of the American Bar Association, reprinted in American Bar Association, *Minimum Fee Schedules* 12, 13 (1970). The *Minimum Fee Schedules* publication also recommended placing "a strong ethical injunction against solicitation of clients by habitual fee-cutting" in the forward of any proposed fee schedule. *Minimum Fee Schedule* at 15. With the foregoing as background, it is unlikely that minimum fee schedules existing at the time of the amendment differed from that established by the Fairfax County Bar in *Goldfarb* in terms of their enforcement mechanisms. Thus, when Congress was considering the 1970 amendment to the CJA, minimum fee schedules were obviously enforced through ethical standards promulgated by state bar associations or state supreme courts. Therefore, fee schedules carrying ethical sanctions for habitual noncompliance were probably "the sense in which the words (minimum hourly scale) were used" when Congress enacted the 1970 amendment to the CJA. *Goldfarb* is thus not inapplicable, as the dissent asserts, since its mandate clearly outlawed minimum fee schedules which were not "purely advisory." The error in the dissent's reasoning regarding the applicability of *Goldfarb* is in its focus on the recommendation rather than on the circumstances existing at the time of the enactment of the 1970 amendment to the CJA.

In response to the dissent's argument that it is "illogical to assume that the statute depends upon a *Goldfarb* schedule for its validity where the necessary predicate for such a schedule, membership in a state bar association, was specifically rejected by Congress," it should be noted that bar association membership, i.e., an integrated bar, is not a prerequisite to a state supreme court's or other governing body's ability to sanction attorneys for unethical conduct. State supreme courts or other governing bodies in states lacking integrated bars have been able to sanction lawyers, practicing before their courts, for malpractice or misconduct. Since the enforcement mech-

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Second, in another provision of the Criminal Justice Act, 18 U.S.C. section 3006A(d)(2), Congress set forth maximum amounts payable under the CJA for an individual case.⁴ However, in section 3006A(d)(3), Congress provided for the waiver of the overall maximums, but in doing so, Congress set specific guidelines and standards to be employed by the court in determining whether a waiver of the statutory maximums is justified; the representation must have been extended or complex, and the excess payment must be found necessary to provide fair compensation. Furthermore, any waiver of the statutory maximum must be submitted to the chief judge of the circuit for approval. Thus, sections 3006A(d)(3) and

⁴ *continued*

anism existing in *Goldfarb* can also exist in states not having an integrated bar, it is the dissent's position which is illogical when he asserts that for *Goldfarb* to validly apply to section 3006A(d)(1) the sponsors would have had to have contemplated making the bar membership mandatory. The Supreme Court in *Goldfarb* outlawed fee schedules which carry ethical sanctions for habitual noncompliance, it was not concerned with the means by which those sanctions were or could be imposed. Thus, the dissent's argument in this regard is without merit.

⁵ 18 U.S.C. Section 3006A(d)(2) recites:

"(2) Maximum amounts.—For representation of a defendant before the United States magistrate or the district court, or both, the compensation to be paid to an attorney or to a bar association or legal aid agency or community defender organization shall not exceed \$1,000 for each attorney in a case in which one or more felonies are charged, and \$400 for each attorney in a case in which only misdemeanors are charged. For representation of a defendant in an appellate court, the compensation to be paid to an attorney or to a bar association or legal agency or community defender organization shall not exceed \$1,000 for each attorney in each court. For representation in connection with a post-trial motion made after the entry of judgment or in a probation revocation proceeding or representation provided under subsection (g) the compensation shall not exceed \$250 for each attorney in each proceeding in each court."

(2) are an indication that Congress intended to retain control over expenditures under the Act and that where Congress intended to allow the maximum fees payable under the CJA to be increased, *it set specific standards to be considered* by the court subject to the additional safeguard of review by the chief judge of the circuit. Therefore, it is clear that Congress did not intend to give judicial councils open-ended authority to increase or decrease the *hourly* rates, without reference to any standard or guideline, but rather intended to grant judicial councils limited authority to be exercised only when there exists a local bar association minimum fee schedule and "where literally the Criminal Justice Act is unworkable."

III.

We conclude that, under 18 U.S.C. section 3006A(d)(1), the judicial council lacked authority to raise or lower the hourly rates payable to attorneys accepting appointments under the CJA in the absence of a local bar association minimum fee schedule.⁶ Although we reach this conclusion, we recognize that as a result of more than a decade of inflation, the hourly rates set in 1970 are no longer realistic today. However, it is important to remember

⁶ We reject the plaintiff's contention that the Seventh Circuit Bar Association's recommendation that Judicial Council raise the hourly rates constitutes a "minimum hourly scale established by a bar association" within the meaning of the CJA. Our review of the legislative history demonstrates that, in limiting the judicial council's authority to increase or decrease the hourly rates proscribed by the Act, Congress contemplated the existence of an established minimum fee schedule like that involved in *Goldfarb*, rather than an ad-hoc recommendation to a judicial council. We recognize that the Supreme Court in *Goldfarb* reserved the question of whether "a purely advisory fee schedule issued to provide guidelines" would constitute price fixing. 421 U.S. at 781. As we stated in footnote 4, in the case before us we have no occasion to decide whether a purely advisory bar association fee schedule would be a predicate for action by a judicial council under section 3006A(d)(1).

that the Criminal Justice Act was never intended to provide full compensation for an attorney's services or to provide fees equal to those charged in private practice. Rather, a lawyer's *pro bono publico* obligation was also meant to act as an incentive for attorneys to accept appointments under the CJA. As the report of the House Judiciary Committee states:

"This compensation was intended to ease the financial burden on the attorney, who offers his services to a defendant as a professional public duty. The level of fees established under the Act was intended to offer some but not full compensation for the appointed attorney and to provide adequate defense services for his client."

H.R. Rep. No. 1546, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Ad. News 3983, 3984. Similarly, in adopting its plan to implement the provisions of the CJA in 1971, the Judicial Council for the Seventh Circuit stated:

"The payment of compensation to counsel under the Act, in most cases, probably will be something less than compensatory. Service of counsel by appointment under the Act will continue to require a substantial measure of dedication and public service. The responsibility of members of the bar to accept appointments and to serve in these cases is the same as it traditionally has been in the past and is in no way lessened by the passage of the Act. We have complete confidence in the professional integrity of the bar to fulfill this responsibility."⁷

Therefore, it is evident that both Congress and the Judicial Council for the Seventh Circuit recognized that

⁷ The Plan of the United States Court of Appeals for the Seventh Federal Circuit to Supplement the Plans of the Several United States District Courts within the Seventh Circuit, pursuant to the Criminal Justice Act of 1964, Title XVIII U.S.C. section 3006A (adopted 1971).

the Criminal Justice Act was intended to provide "some but *not full* compensation for the appointed attorney", and that representation of indigent defendants under the Act would "require a substantial measure of dedication and public service."

This court recently discussed "the recognized ethical responsibilities of each lawyer engaged in the practice of law to provide public interest legal services without a fee."

"There has been increasing consideration given to the social responsibility of lawyers to provide *pro bono publico* services. In 1975 the American Bar Association House of Delegates explicitly reaffirmed the professional obligation of each lawyer to provide public interest services and there currently exists serious discussion on mandating a minimum service as part of the proposed Rules of Professional Conduct. *Ray v. Robinson*, 640 F.2d 474, 478-79 (3d Cir. 1981). See also *Scott v. Plante*, 532 F.2d 939, 949-50 (3d Cir. 1976); *Peterson v. Nadler*, 452 F.2d 754, 758 (8th Cir. 1971). *Accord*, *Powell v. Alabama*, 287 U.S. 45, 73, 53 S.Ct. 55, 65, 77 L.Ed. 158 (1932) ("Attorneys are officers of the Court, and are bound to render services when required by such an appointment.").

* * *

"The bar within this Circuit has long viewed appointments of counsel as part of its professional duty to provide public service. We have faith that lawyers always will be found who are willing to represent the indigent without remuneration.

* * *

"*Pro bono publico* work is an established tradition and it is up to the district courts to tap the reservoir of talent that exists within this Circuit."

Caruth v. Pinkney, 683 F.2d 1044, 1049 (7th Cir. 1982). Similarly, the Eighth Circuit in *Peterson v. Nadler*, 452 F.2d 754, 758 (8th Cir. 1981) stated:

"Lawyers have long served in state and federal practice as appointed counsel for indigents in both criminal and civil cases. The vast majority of the bar have viewed such appointments to be integrally within their professional duty to provide public service. . . . We have the utmost confidence that lawyers will always be found who will fully cooperate in rendering the indigent equal justice at the bar."

In recognition of the *pro bono publico* obligations of attorneys, the District Court for the Northern District of Illinois has recently promulgated a local rule requiring members of its trial bar to be available for one *pro bono publico* appointment each year. Local Rule 3.31, Northern District of Illinois.⁸

We are sympathetic with efforts to increase the inadequate hourly rates now payable to appointed counsel under the Criminal Justice Act. However, the fact that the \$30-\$20 hourly rates set forth in the CJA have become inadequate as a result of the vicissitudes of inflation does not make the statute mean something in 1983 it did not mean in 1970. Congress imposed limits on a judicial council's authority to raise the hourly rates set forth in the CJA. Therefore, it is the role of Congress, and not the judiciary, to amend the statute to comport with the

⁸ Local Rule 3.31 states:

"Rule 3.31. Duty of Trial Bar to Accept Appointments.

In testimonial proceedings (as defined in General Rule 3.00C(1) of these Rules) arising out of matters pending before this Court, every member of the trial bar shall be available for appointment by the court to represent or assist in the representation of those who cannot afford to hire a member of the trial bar. Appointments under this Rule shall be made in a manner such that no member of the trial bar shall be required to accept more than one appointment during any twelve (12) month period."

economics of legal practice in the 1980's. "Under our constitutional framework, federal courts do not sit as councils of revision, empowered to rewrite legislation in accord with their own conceptions of prudent public policy." *United States v. Rutherford*, 442 U.S. 544, 555 (1979). "Economic exigencies . . . do not grant the courts a license to rewrite a statute no matter how desirable the purpose or result might be." *West Virginia Div. of Izaak Walton League v. Butz*, 522 F.2d 945, 955 (4th Cir. 1975). Congress, unlike the federal courts, has the power to conduct hearings, commission studies and consider the views of interest groups in determining the appropriate level of compensation for attorneys appointed under the Criminal Justice Act, taking into account factors such as increases in the cost of living since 1970 as well as the federal government's budgetary constraints. We trust that Congress will give a high priority to amending the Criminal Justice Act to provide realistic compensation for appointed attorneys.

We hold that the Judicial Council for the Seventh Circuit lacked authority to raise the hourly rates prescribed in the Criminal Justice Act, in the absence of a local bar minimum fee schedule. Therefore, the judgment of the district court is affirmed.

SWYGERT, *Senior Circuit Judge*, dissenting. Section 3006A(d)(1) of the Criminal Justice Act of 1964, 18 U.S.C. § 3006A (1976) ("the Act"), provides that appointed counsel be compensated "at a rate not exceeding \$30 per hour for time expended in court or before a United States Magistrate and \$20 per hour for time expended out of court." This section also empowers the Judicial Council of each circuit to fix compensation at "such other hourly rate, . . . not to exceed the minimum hourly scale established by a bar association for similar services rendered in the district." *Id.* In response to the recommendation of a bar association, the Bar Association of the Seventh Federal Circuit, the Judicial Council of the Seventh Circuit approved an increase in fees from \$30 to \$55 per hour for time spent in court and from \$20 to \$45 per hour for time spent out of court.

Although the majority purports to recognize "policy considerations weighing for or against a particular construction of the statute," it inexplicably travels a rather tortuous and selective journey to hold that the Judicial Council lacked authority to increase the hourly rates paid to court-appointed attorneys under the Act. The majority's conclusion necessarily rests on the following premises: first, that the existence of a local bar association minimum fee scale is a condition precedent to the Judicial Council's authority to alter hourly rates; second, that only a fee scale of the type held violative of the antitrust laws in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), will suffice; and third, because *Goldfarb* invalidated such fee scales, this section of the Act has been voided, and it is up to Congress to amend the Act. Because my review of the Act and its legislative history reveals no support for the first two assumptions, because the third need not be reached, and because in any view the majority's holding ignores the well settled tenet that "in interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute and the objects and policy of the law," *Brown v. Duchesne*, 19 How. 183, 194 (1857), *quoted in*

Bob Jones University v. United States, 51 U.S.L.W. 4593, 4596 (U.S. May 24, 1983), I respectfully dissent.

I

The majority correctly notes that the starting point is the language of the statute itself. Section 2600A(d)(1) authorizes a Judicial Council to set compensation at "such other hourly rate," and that this rate may not "exceed the minimum hourly scale established by a bar association for similar services rendered in the district." Following a selective review of this section's legislative history, the majority concludes that "Congress presumed that such a fee schedule would exist before a Judicial Council would be authorized to increase or decrease the hourly rates." Although I concede that the legislative history is far from clear, and that it may appear the majority and I are merely emphasizing different portions of legislative history, I do so in favor of "a construction that bestows the benefits of the Act on those for whom it was chiefly intended." *Ralpho v. Bell*, 569 F.2d 607, 608 (D.C. Cir. 1977).

At the outset, it is clear Congress was well aware that not all jurisdictions had established minimum fee scales. The report from the Committee on the Judiciary notes that "[a] 1970 publication of the American Bar Association, entitled 'Minimum Fee Schedules,' indicates . . . that 46 States have minimum hourly rates for legal office work set by bar associations and that in 20 of these States the minimum is less than \$20."¹ H.R. Rep. No. 1546, 91st Cong., 2d Sess. 9, reprinted in 1970 U.S.

¹ The majority, in footnote 3, *ante*, "fail[s] to understand" how congressional awareness that not all states had fee schedules supports my position, and simply finds that the Act would not be operative in such states. This interpretation, however, is contrary to "the generally accepted principle that Congress normally intends that its laws shall operate uniformly throughout the nation so that the federal program will remain unimpaired." *Reconstruction Finance Corp. v. Beaver County*, 328 U.S. 204, 209 (1945).

Code Cong. & Ad. News 3983, 3990. The recognition that Congress understood not all districts had minimum fee scales serves to put the various remarks made by the bill's sponsors in perspective. For example, Representative Kastenmeier, upon whose comments the majority places great weight, stated that "[i]f in a particular case the judicial council feels that the hourly maximums are inadequate, it is nevertheless limited to [a] minimum rate, *if any*, set by a bar association." 116 Cong. Rec. 34,811 (1970) (emphasis added).

The majority's conclusion that a Judicial Council is powerless absent a bar association fee scale results in large part from its perception that Congress feared delegating such spending power to the Judicial Councils. I find this concern unsupportable for two reasons. First, it is apparent that Congress declined to empower bar associations with discretion to set appropriate fees. Again, it was Representative Kastenmeier who explained that "[n]othing in the legislation delegates the authority of Congress to determine rates of compensation to *local bar associations*." 116 Cong. Rec. 34,811 (1970) (emphasis added). See also remarks of Representative Biester, *id.* at 34,812 ("It should also be pointed out that the *Judicial Council* has the power under this language, and not a local bar association.") (emphasis added). The majority's insistence that a fee scale is a condition precedent delegates to a bar association exactly this type of control: in areas where the statutory rates of \$20 and \$30 per hour were in fact *higher* than the "going rate," there would be little incentive for a bar association to establish a fee scale which would allow the Judicial Council to lower compensation. And under the majority's analysis, the Council would be unable to act in the absence of such a scale. This result is directly contrary to the expressed purpose of the amendment, which was to ensure "that the bill is neither a bonanza for some lawyers to get more than the going rate in that town, nor an empty shell which will not be used because the rates are below the going charge in those towns." *Id.* (remarks of Rep. [now Circuit Judge] Mikva).

Second, the majority's concern that "judicial councils would be left with virtually unrestrained authority to increase or decrease the maximum hourly rates," *see ante* at 14, loses considerable force when viewed in conjunction with the virtually unrestrained authority delegated to the judiciary under other sections of the Act. For example, the Judicial Council is charged with supervisory power over district courts to implement the Act (section 3006A(a)), is authorized to "supplement the plan with provisions for representation on appeal" (*id.*), and may direct the district courts to modify any aspect of the plan (*id.*). The district court has discretion to appoint counsel in any case where "the interests of justice so require," (section 3006A(g)), and, with the approval of the chief judge of the circuit, may waive the maximum compensation limit of the Act (section 3006A(d)(3)). I suspect that any number of choices made by a Judicial Council or a district court under the above provisions would have an equal impact on the money spent to ensure representation of criminal defendants as would raising the hourly compensation.

The majority points to the waiver provision in section 3006(d)(3) as proof that "Congress intended to retain control over expenditures under the Act" because this section provides "specific guidelines and standards" for when waiver is appropriate. I find, however, that a standard such as "necessary to provide fair compensation" still "leave[s] something to be desired," *United States v. Bailey*, 581 F.2d 984, 989 (D.C. Cir. 1978), and in the final analysis must still be viewed "by everyday judicial experience." *Id.* I conclude that the statute delegates authority to modify the hourly rates to the Judicial Council, and that this authority was not intended to be circumscribed by a local bar association.

II

Even assuming that an hourly scale established by a bar association is a condition precedent to raising the rates paid under the Act, in my view the issue in this case is whether the recommendation from the Bar Asso-

ciation of the Seventh Federal Circuit to the Judicial Council satisfies this condition. In answering this question in the negative, the majority appears to embrace alternative theories: first, that *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), rendered all fee schedules invalid under the Sherman Act; and, second, that in the absence of a *Goldfarb* schedule, the Judicial Council is stripped of its authority to alter the hourly fees payable under the Act.

In my view, the first assumption requires little discussion. The majority finds that "[i]n the wake of the *Goldfarb* decision, minimum fee schedules have been abolished" *Ante* at 4. The fee schedule at issue in *Goldfarb*, however, "was enforced through the prospect of professional discipline from the State Bar, and the desire of attorneys to comply with announced professional norms." 421 U.S. at 781. The Supreme Court expressly noted that "[a] purely advisory fee schedule issued to *provide guidelines*, or an exchange of price information without a showing of an actual restraint on trade, would present us with a different question." *Id.* (emphasis added). In this case, no one alleges that the recommendation from the Bar Association of the Seventh Federal Circuit was binding on any attorney, much less that this association has any power or intent to enforce such a recommendation. For those reasons, I find *Goldfarb* inapplicable.²

² Even granting arguendo that the existence of a fee schedule is a condition precedent for action by the Judicial Council, I therefore need not reach the question of severability the majority feels compelled to address. It is compelled because of its view that only an illegal fee schedule can satisfy the statute, a view not only refuted by the discussion above, but at odds with the familiar principle that statutes should be construed so as to be effective. See *FTC v. Manager, Retail Credit Co.*, 515 F.2d 988, 994 (D.C. Cir. 1975) ("The presumption against interpreting a statute in a way which renders it ineffective is hornbook law."). Because under my interpretation the statute can be satisfied by a legal fee schedule (assuming the necessity of such a schedule), the question whether a statute whose condition precedent is always illegal should be saved by severing the illegal condition does not arise.

The issue then becomes whether the recommendation to the Judicial Council constitutes a "minimum hourly scale established by a bar association for similar services rendered in the district" as intended under the Act. The majority finds that "the legislative history demonstrates that . . . Congress contemplated the existence of an established minimum fee schedule like that involved in *Goldfarb*," ante at 17 n.3, yet no demonstrations of such legislative history are supplied. Apart from my reluctance to attribute to Congress prophetic and self-destructive powers such that in 1970 the sole type of fee scale it contemplated was the type five years later to be held invalid in *Goldfarb*, I am unable to discern any indication from the legislative history of this section that only an enforced, mandatory fee schedule would trigger the authority of the Judicial Council to increase hourly fees. To the contrary, all indicia of legislative intent lead to the conclusion that the recommendation furnished in this case is precisely the kind of local, advisory input required under the statute.

The crucial underpinning of the Supreme Court's decision in *Goldfarb* was the fact that the state bar association had both the power to enforce the minimum fee schedule and apparently little reservation in wielding that power. A necessary corollary of this finding is that the attorneys subject to this disciplinary power were members of the Virginia State Bar Association, for the state bar association would have no control over the fees charged by attorneys not licensed in that state. It follows, then, that if the sponsors of section 3006A(d)(1) indeed contemplated the existence of a *Goldfarb* fee schedule (as the majority holds), they would have made membership in a state bar association mandatory. The legislative history of the Act refutes this reasoning. As pointed out above, Congress was aware that not all states had established minimum fee schedules. Moreover, Representative Kastenmeier expressly rejected the suggestion that bar membership was a prerequisite to compensation under the Act. In response to the question whether "an attorney who is going to participate in this system has to belong to the bar in the State in which he

is practicing," Representative Kastenmeier replied that "[t]here is no provision in this bill establishing that as a matter of practice," and that "[t]his would be a matter entirely up to the Court." 116 Cong. Rec. at 34,813. It is therefore illogical to assume that the statute depends upon a *Goldfarb* schedule for its vitality where the necessary predicate for such a schedule, membership in a state bar association, was specifically rejected by Congress.

Finally, any mention of the statute's requirement of an "hourly scale" reveals an extremely liberal use of that term. It is referred to as a "bar association rate," the "going rate," and a rate "left to the judge, not to the bar association, and it is hoped it will in fact reflect what the private practitioner charges in those jurisdictions." *Id.* at 34,812 (remarks of Rep. Mikva). I conclude that the recommendation given the Judicial Council in this case is an "hourly scale" as used in this section for "similar services rendered."

III

In summary, I find that section 3006A(d)(1) authorizes the Judicial Council to increase hourly rates paid attorneys appointed under the Act, and that this authority is limited only by a minimum hourly scale, "if any." Furthermore, even assuming that a fee scale need exist for the Judicial Council to act, I conclude that the recommendation of the Bar Association of the Seventh Federal Circuit was sufficient. I therefore dissent.

A true Copy:

Teste:

*Clerk of the United States Court of
Appeals for the Seventh Circuit*

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MARTHA MILLS,)
) Judge Flaum
v.)
) No. 82 C 1057
UNITED STATES OF)
AMERICA)

Brief Statement of Motion:

Motion for summary judgment and cross
motion for summary judgment.

Reserve space below for notations by minute
clerk:

The Government's motion for summary
judgment on the complaint is granted and
Mills' motion is denied.

APPENDIX 2

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MARTHA MILLS,)	
)	
Plaintiff,)	
)	82 C 1057
v.)	
)	
UNITED STATES OF)	
AMERICA,)	
)	
Defendant.)	

MEMORANDUM OPINION

JOEL M. FLAUM, District Judge:

This matter comes before the court on a motion for summary judgment by defendant United States of America (the "Government") and a cross motion for summary judgment by plaintiff Martha A. Mills ("Mills") made pursuant to Federal Rule of Civil Procedure 56(c). For the reasons set forth below, the Government's motion for summary judgment on the

complaint is granted and Mills' cross motion is denied.

The pertinent facts of this case are as follows:

The Criminal Justice Act of 1964 (the "Criminal Justice Act"), 18 U.S.C. § 3006A (1976), provides that an attorney appointed pursuant to its provisions, or the organization supplying the attorney so appointed, shall "be compensated at a rate not exceeding \$30 per hour for time expended in court or before a United States magistrate and \$20 per hour for time reasonably expended out of court, or such other hourly rate, fixed by the Judicial Council of the Circuit, not to exceed the minimum hourly scale established by a bar association for similar services rendered in the district." 18 U.S.C. § 3006A(d)(1)

(1976). On December 18, 1981, the Judicial Council of the United States Court of Appeals for the Seventh Circuit (the "Judicial Council"), acting on a recommendation by the Bar Association of the Seventh Federal Circuit (the "Seventh Circuit Bar Association"), increased the maximum fees to \$55 per hour for time spent in court or before a magistrate and \$45 per hour for out-of-court time.

Mills, an attorney engaged in the private practice of law, is a panel attorney in the Federal Defender Program for the Northern District of Illinois who accepts court appointments under the Criminal Justice Act. In that capacity, on January 8, 1982, Mills was appointed to represent Stanley Dobbs ("Dobbs"), a defendant in a criminal case pending in the

United States District Court for the Northern District of Illinois. She subsequently submitted a request for the sum of \$127.50 for time spent representing Dobbs which was computed on the basis of the hourly rates set by the Judicial Council on December 18, 1981. The United States magistrate before whom Mills appeared approved this request, and it was submitted to the Administrative Office of the United States Courts (the "Administrative Office") for processing and payment.

The Administrative Office, claiming that the Judicial Council lacked the authority to raise the hourly rates to \$55 and \$45, respectively, refused to pay the full amount of \$127.50. In a letter to Mills dated February 18, 1982, R.E.

Moreland, Chief of the Audit Branch, Financial Management Division, of the Administrative Office, stated "It is the position of this office that we do not have the authority to reimburse attorneys for services provided defendants proceeding under the Criminal Justice Act in excess of those maximum hourly rates prescribed by the Act. We are bound by the statutory maximum of \$30 per hour for in-court service and \$20 per hour for out-of-court service as specified in 19 U.S.C. § 3006A(d)(1)."

On February 22, 1982, Mills filed suit in the United States District Court for the Northern District of Illinois, Eastern Division, alleging the jurisdiction of the district court pursuant to 28 U.S.C. § 1346(a)(2) (1976 & Supp. II 1978). In her

complaint Mills asks the court to order the Government to pay her the sum of \$127.50 as the compensation due for services rendered in representing Dobbs and award her the cost of this action, including reasonable attorney's fees pursuant to 28 U.S.C. § 2412 (1976 & Supp. IV 1980).

Mills bases her position on the premise that the "not to exceed" language of the Criminal Justice Act does not make existence of a bar association minimum fee schedule a condition percedent to a rate adjustment. She sets forth three reasons as to why she reaches this conclusion: (i) that the language of the statute does not require that a bar association minimum exist; (ii) that Congress knew how to draft mandatory language; and (iii) that nothing in the statute requires a local bar

association to exist in every court district or, if it does exist, to have a minimum fee. She also cites several principles of statutory construction and the legislative history of the Criminal Justice Act to support her position. In addition, Mills contends that even if existence of a bar association fee schedule were a condition precedent, the Judicial Council, in acting upon the recommendation of the Seventh Circuit Bar Association, satisfied this requirement.

Federal Rule of Civil Procedure 56(c) provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and

that the moving party is entitled to a judgment as a matter of law." Id. Since no dispute as to a material fact is being raised by the parties, and the court finds none, it is appropriate to decide this case as a matter of law. See Illinois Migrant Council v. Campbell Soup Co., 438 F. Supp. 222, 225 (N.D. Ill. 1977), rev'd on other grounds, 574 F. 2d 374 (7th Cir. 1978).

The basic issues presented in this case are: (i) whether the existence of a bar association fee schedule is a condition precedent to a judicial council raising the hourly compensation to attorneys representing defendants pursuant to the Criminal Justice Act and (ii) if existence of such a fee schedule is a condition precedent, how this requirement is affected by the United States Supreme Court

decision of Goldfarb v. Virginia State Bar.
421 U.S. 773 (1975), in which a bar
association minimum fee schedule was held
to be within the reach of the Sherman Act,
15 U.S.C. § 1 (1976).

As Mills accurately points out in
"Plaintiff's Memorandum in Support of Her
Motion for Summary Judgment", the starting
point in construing a statute is the
statute itself. See Greyhound Corp. v. Mt.
Hood Stages, Inc., 437 U.S. 322, 330
(1978); Chicago Transit Authority v.
Adams, 607 F. 2d 1284, 1289 (1979), cert.
denied, 446 U.S. 946 (1979). However, her
contention that it is clear from the
language of the Criminal Justice Act that a
bar association fee schedule need not exist
in order for a judicial council to raise
attorney's fees is not accepted. Indeed,

the more persuasive argument is that this language contemplates that a fee schedule will exist. Accordingly, to determine how the statute should be construed, it is helpful to consider the legislative history of the Act and general rules of statutory interpretation.

The Criminal Justice Act, passed by Congress in 1964, originally provided that the hourly fee for representing a defendant could not exceed \$15 for time in court or before a U.S. commissioner and \$10 for out-of-court time. See Criminal Justice Act of 1964, Pub. L. No. 88-455, § 2, 78 Stat. 552 (1964). In 1970 an amendment (the "1970 Amendment") was enacted which included the substitution of the fee provision in question in this case in place of the original provision. See Pub. L.

No. 91-447, § 1, 84 Stat. 916 (1970),
codified at 18 U.S.C. § 3006A(d)(1) (1976).

The legislative history of the 1970 Amendment indicates that the revisions originally proposed by the Senate and submitted to the Committee on the Judiciary of the House of Representatives would have raised the hourly compensation for all attorney time to \$30. See H.R. Rep. No. 1546, 91st Cong., 2d Sess., reprinted in 1970 U.S. Code Cong. & Ad. News 3983. The House Judiciary Committee rejected this approach and reinserted the distinction between court and non-court time. It also added the provision that a judicial council could modify the hourly rate "not to exceed the minimum hourly scale established by a bar association for similar services rendered in the district." Id.; 18 U.S.C.

§ 3006A(D)(1) (1976).

The revised bill was managed in the House of Representatives by Representative Robert William Kastenmeier of Wisconsin, chairman of the House Subcommittee on the Courts, Civil Liberties and the Administration of Justice. In urging its passage, Representative Kastenmeier stated:

Nothing in the legislation delegates the authority of Congress to determine rates of compensation to local bar associations. Rates of compensation and maximum amounts of compensation are to be fixed by the judicial councils within the maximums prescribed by Congress....If in a particular case the judicial council feels that the hourly maximums are inadequate, it is nevertheless limited to [the] minimum rate, if any, set by a bar association.

116 Cong. Rec. 34811 (1970). He responded to the question of "Why do you set up \$30 an hour, \$20 an hour, and then turn around and say in the same breath that the

Judicial Council can change it if it wants to" by stating":

The other amendment [the provision giving the judicial councils authority to raise the hourly rate] is an exceptional provision not to be generally used. It provides that the Judicial Council of the Circuit, where literally the Criminal Justice Act is unworkable [,] some sort of additional compensation, [sic] may fix a rate not more than the local bar association rate.

That, as I said, is an exceptional provision, but we regard it as a sort of safety valve for some cases to avoid an inequity and a disservice to the act.

Id. at 34812. These comments indicate that Representative Kastenmeier believed that under the 1970 Amendment the discretion of a judicial council to raise fees was limited by a specific ceiling - the minimum bar association fee schedule - and that he presumed the existence of such a fee schedule.

The United States Supreme Court has

stated that the explanation of a piece of legislation by one of its sponsors "deserves to be accorded substantial weight in interpreting the statute."

Federal Energy Administration v. Algonquin Sng. Inc., 426 U.S. 548, 564 (1976).

Although technically not a sponsor of the 1970 Amendment, in light of his role in managing the legislation in the House of Representatives, the fact that Representative Kastenmeier viewed the power of a judicial council as being limited must be given meaningful weight in interpreting the provision in question.

The Director of the Administrative Office, who is responsible for supervising payments made to attorneys under the Act,^{1/} has taken the position that the existence of a bar association fee schedule is a

condition precedent to a judicial council increasing the hourly compensation. The approach taken by the Administrative Office is especially significant because the United States Supreme Court repeatedly has stated that when a question of statutory construction arises great deference should be given to how the statute is interpreted by the officers or agents charged with its administration. See e.g., Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 381 (1969); Zemel v. Rusk, 381 U.S. 1, 11 (1965); Udall v. Tallman, 380 U.S. 1, 16 (1965). Following this direction, in a recent case the United States Court of Appeals for the Seventh Circuit looked to whether a compelling justification existed in determining if the interpretation advanced by the

official charged with administering a statute should be overruled and stated that "Absent compelling indications that this interpretation was wrong, the Secretary's construction of the statute should have been followed." In re Chicago, Milwaukee, St. Paul & Pacific Co., 673 F. 2d 169, 173 (7th Cir. 1982), citing Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969) ("The construction of a statute by those charged with its execution should be followed unless there are compelling reasons that it is wrong". Id. at 381). In his "Memorandum To All Chief Judges, U.S. Courts of Appeals," dated December 29, 1981, William E. Foley, the Director of the Administrative Office stated that "[a]s a result of my extensive involvement with the Criminal Justice Act

since its inception, I am convinced that the Circuit Councils do not currently possess the authority to increase the hourly rates of compensation above the statutory maximum...." Since this court has found no compelling indications that Foley's interpretation is wrong, due deference must be given to such an administrative determination.

Thus, based on the language of the Criminal Justice Act, its legislative history and the position taken by the Administrative Office, the court concludes that the existence of a bar association fee schedule is a condition precedent to a judicial council being empowered to raise the hourly compensation to attorneys. Accordingly, the question of whether this condition precedent is affected by the

United States Supreme Court decision of Goldfarb v. Virginia State Bar, in which the Court held that a bar association minimum fee schedule was within the reach of the Sherman Act, 15 U.S.C. § 1 (1976), must be considered since Goldfarb has resulted in the abolition of bar association fee schedules. See 421 U.S. 773.

It is a well accepted principle of statutory construction that if the qualifying portion of a statute is held to be unconstitutional such a holding should not serve to expand the scope of authority which the statute grants.^{2/} This principle was applied by the United States Court of Appeals for the Fourth Circuit in McCorkle v. United States, 559 F. 2d 1258 (4th Cir. 1977), in deciding an issue analogous to

the one before this court. In McCorkle the court considered language of a provision in the Federal Salary Act of 1967 (the "Federal Salary Act") which provided that salary recommendations by the President submitted to Congress will become effective "but only to the extent that" between the submittal and the effective date no other rate has been enacted into law and/or neither House of Congress has enacted legislation disapproving of the Presidential recommendations. See 2 U.S.C. § 359(1) (1976). The court concluded that if the provision which, in effect, enabled one House of Congress to veto a Presidential recommendation was unconstitutional, the President would not have authority to establish salaries pursuant to the section of the Federal

Salary Act in question. In explaining this conclusion, the court stated "When the questioned clause restricts a power granted by the legislature, the case against severance is strong. Otherwise, the scope of the power would be enlarged beyond the legislature's intent." 559 F. 2d at 1261. The "not to exceed" language of the Criminal Justice Act being examined by this court is analogous to the "but only to the extent" language in question in McCorkle. Here, as in McCorkle, Congress placed a limit on a power granted and the invalidity of the standard imposed cannot serve to expand the scope of the power granted.

This court is sympathetic to efforts to raise the compensation paid to attorneys from private practice who accept

appointments under the Federal Defender Program. The court recognizes that the report of the Committee on the Judiciary of the House of Representatives, which recommended passage of the 1970 Amendment, stated that one way the Amendment sought to accomplish its purpose of improving the criminal Justice Act was to make the maximum compensation to appointed counsel "more realistic in terms of today's conditions." H.R. Rep. No. 1546, 91st Cong., 2d Sess., reprinted in 1970 U.S. Code Cong. & Ad. News 3983. Certainly fees which were realistic in 1970 are no longer appropriate in 1982. Unfortunately, however, the fact that the court is understanding of efforts to raise attorney's fees from the hourly rate which was deemed appropriate in 1970 cannot

empower it to decide in Mills' favor.

For the above reasons, this court concludes that the Judicial Council lacked the authority to raise the hourly rates of compensation to be paid to attorneys pursuant to the Criminal Justice Act. Under the present state of the legislation, Congress, not the courts, must act if the compensation paid is to be more than \$30 per hour for in-court time, or appearances before a magistrate and \$20 per hour for out-of-court time. In this regard, a bill has been introduced in the House of Representatives which would give the Judicial Conference of the United States the specific authority to modify the maximum hourly rates of compensation for attorneys representing indigents under the Criminal Justice Act. See H.R. 5190, 98th

Cong., 1st Sess. (1981), introduced in the House of Representatives on December 11, 1981.^{3/}

Accordingly, the Government's motion for summary judgment on the complaint is granted and Mills' motion is denied.

It is so ordered.

UNITED STATES DISTRICT JUDGE

DATED: September 19, 1982

APPENDIX 3

1/ See 18 U.S.C. § 3006A(j) (1976).

2/ See, e.g., *Davis v. Wallace*, 257 U.S. 478 (1922) ("Where an excepting provision in a statute is found unconstitutional, courts very generally hold that this does not work an enlargement of the scope or operation of other provisions with which that provision was enacted, and which it was intended to qualify or restrain." *Id.* at 484); *Quinn v. Commissioner of Internal Revenue*, 524 F. 2d 617 (7th Cir. 1975) ("when a section of a statute is declared void, the statute cannot be given effect as though the legislature had not enacted the conditions limiting its operation." *Id.* at 626); *U.T. Incorporated v. Brown*, 457 F. Supp. 163 (W.D.N.C. 1978) ("It is a cardinal rule of construction that where an excepting clause or restriction is found unconstitutional the substantive provisions it qualifies cannot stand. The court will not assume that the legislative body would have enacted the ordinance without the exceptions, nor can the court determine how the substantive provisions of the ordinance might otherwise have been modified had it been known the exceptions would be found unconstitutional." *Id.* at 170 (citations omitted).

3/ Specifically H.R. 5190 provides, in relevant part, "Any attorney appointed under this section or any bar association.

legal aid agency, or community defender organization which has provided the appointed attorney shall, at the conclusion of the representation or any segment thereof, be compensated for time expended in court or before a United States magistrate and for time reasonably expended out of court at rates not to exceed those established by the Judicial Conference of the United States. The Judicial Conference may modify such maximum hourly rates from time to time as necessary and appropriate to provide for reasonable compensation to attorney's providing representation under this section.: H.R. 5190, 98th Cong., 1st Sess. (1982).

RELEVANT STATUTES

18 U.S. § 3006A:

§3006A. Adequate representation of defendants

(a) Choice of plan. - Each United States district court, with the approval of the judicial council of the circuit, shall place in operation throughout the district a plan for furnishing representation for any person financially unable to obtain adequate representation (1) who is charged with a felony or misdemeanor (other than a petty offense as defined in section 1 of this title) or with juvenile delinquency by the commission of an act which, if committed by an adult, would be such a felony or misdemeanor or with a violation of probation, (2) who is under arrest, when such representation is required by law, (3) who is subject to revocation of parole, in custody as a material witness, or seeking collateral relief, as provided in subsection (g), or, (4) for whom the Sixth Amendment to the Constitution requires the appointment of counsel or for whom, in a case in which he faces loss of liberty, any Federal law requires the appointment of counsel. Representation under each plan shall include counsel and investigative, expert, and other services necessary for an adequate defense. Each plan shall include a provision for private attorneys. The plan may include, in addition to a provision for private attorneys in a

substantial proportion of cases, either of the following or both:

(1) attorneys furnished by a bar association or a legal aid agency; or

(2) attorneys furnished by a defender organization established in accordance with the provisions of subsection (h).

Prior to approving the plan for a district, the judicial council of the circuit shall supplement the plan with provisions for representation on appeal. The district court may modify the plan at any time with the approval of the judicial council of the circuit. It shall modify the plan when directed by the judicial council of the circuit. The district court shall notify the Administrative Office of the United States Courts of any modification of its plan.

* * * * *

(d) Payment for representation.

(1) Hourly rate.-Any attorney appointed pursuant to this section or a bar association or legal aid agency or community defender organization which has provided the appointed attorney shall, at the conclusion of the representation or any segment thereof, be compensated at a rate not exceeding \$30 per hour for time expended in court or before a United States magistrate and \$20 per hour for time reasonably expended out of court, or such other hourly rate, fixed by the Judicial

Council of the Circuit, not to exceed the minimum hourly scale established by a bar association for similar services rendered in the district. Such attorney shall be reimbursed for expenses reasonably incurred, including the costs of transcripts authorized by the United States magistrate or the court.

(2) Maximum amounts.-For representation of a defendant before the United States magistrate or the district court, or both, the compensation to be paid to an attorney or to a bar association or legal aid agency or community defender organization shall not exceed \$1,000 for each attorney in a case in which one or more felonies are charged, and \$400 for each attorney in a case in which only misdemeanors are charged. For representation of a defendant in an appellate court, the compensation to be paid to an attorney or to a bar association or legal aid agency or community defender organization shall not exceed \$1,000 for each attorney in each court. For representation in connection with a post-trial motion made after the entry of judgment or in a probation revocation proceeding or for representation provided under subsection (g) the compensation shall not exceed \$250 for each attorney in each proceeding in each court.

(3) Waiving maximum amounts.-Payment in excess of any maximum amount provided in paragraph (2) of this subsection may be made for extended or complex

representation whenever the court in which the representation was rendered, or the United States magistrate if the representation was furnished exclusively before him, certifies that the amount of the excess payment is necessary to provide fair compensation and the payment is approved by the chief judge of the circuit.

APPENDIX 4

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

CHAMBERS OF
WALTER J. CUMMINGS
CHIEF JUDGE
219 SOUTH DEARBORN STREET
CHICAGO, ILLINOIS 60604

December 23, 1981

Mr. William E. Foley, Director
Administrative Office of the
United States Courts
Washington, D.C. 20544

Dear Bill:

The Judicial Council of the Seventh Circuit on December 18, 1981, increased the Criminal Justice Act maximum fees from \$20 an hour for out-of-court time and \$30 an hour for in-court time to \$5 and \$55, respectively. These rates will apply for work performed on or after January 1, 1982. The Council took that action pursuant to its authority under 18 U.S.C. § 3006A(d)(1). The action was based on a recommendation from the Bar Association of the Seventh Federal Circuit of the need to increase the fees to those amounts.

Sincerely,

/s/ Walter J. Cummings
Chief Judge of the
Seventh Circuit

cc: Chief Circuit Judges
Circuit Executives

APPENDIX 5

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
WASHINGTON, D.C. 20544

December 29, 1981

WILLIAM E. FOLEY
DIRECTOR

JOSEPH F. SPANIOL, JR.
DEPUTY DIRECTOR

MEMORANDUM TO ALL CHIEF JUDGES, U.S.
COURTS OF APPEALS

I have been informed that the Judicial Council of the Seventh Circuit has notified each of you of its action in adopting a resolution increasing the hourly rates of compensation for counsel appointed under the Criminal Justice Act.

I believe you should be aware of the views of the Administrative Office on this subject.

Attached for your review is a copy of a memorandum from the Chief, Criminal Justice Act Division to the Chairman, Judicial Conference Committee to Implement the Criminal Justice Act, discussing the question of whether or not the Judicial Councils of the Circuits have the authority to fix hourly rates of compensation for counsel appointed under the Criminal Justice Act in excess of the \$30 and \$20 maximums prescribed in the Act.

As a result of my extensive involvement with the Criminal Justice Act since its inception, I am convinced that the Circuit Councils do not currently possess the authority to increase the hourly rates of compensation above the statutory maximums, and therefore this office will not approve any payments in excess of the statutory hourly maximums until such time as the legal authority of the Circuit Councils is clarified.

William E. Foley

Attachment.

APPENDIX 6

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
Washington, D.C. 20544

William Foley
Director

Joseph F. Spaniol, Jr.
Deputy Director

September 29, 1982

Mr. William J. Anderson
Director
General Government Division
United States General Accounting Office
Washington, D.C. 20548

Dear Mr. Anderson:

Thank you for providing copies of your proposed report on the Administration of the Criminal Justice Act (CJA) and for offering me the opportunity to respond to your findings and recommendations.

* * *

I. CJA RATES

The results of the GAO survey of district and circuit courts with respect to the adequacy of current CJA rates of compensation are not consistent with the reports which we have received during our

interviews with judicial officers throughout the country and our discussions with members of the United States Judicial Conference CJA Committee. We note, however, that on pages 5, 36, and 37, your draft report refers to "obtain[ing] attorneys" willing to accept CJA cases. On page 3 of your draft report you state:

However, prior to the passage of the Criminal Justice Act of 1964, these attorneys represented defendants free of charge. The Congress and the Judiciary became concerned as to whether such a practice discouraged the more experienced attorneys from accepting such cases. The Congress and the Judiciary believed that if reasonable compensation for in-and-out-of-court time plus expenses was paid by the government more experienced attorneys would be willing to accept these cases thus insuring adequate legal representation.

To your observation, we would add that the Congress and the Judiciary were concerned that the failure to compensate attorneys at reasonable rates for time reasonably expended might foster compromises in the quality of the defense effort and that in all appointments adequate legal representation should be more reasonably assured. We therefore believe that the critical omission which could account for the discrepancy between your findings and our own is that while yours relate to the ability of the courts

to obtain attorneys, our findings relate to the court's difficulties in obtaining "qualified" attorneys. We think the distinction is critical and therefore appreciate your support for a review of the adequacy of CJA rates even though your reason is based upon your view that "a payment rate that has remained unchanged since 1970 is of necessity suspect."

With respect to your concern over the need to retain congressional oversight in the matter of setting maximum hourly rates of compensation, we would point out that all matters relating to the appropriation for defense services are reviewed by the Criminal Justice Act Division and the Financial Management Division of the Administrative Office of the United States Courts, the United States Judicial Conference Committee to Implement the Criminal Justice Act, (CJA Committee), the Budget Committee of the United States Judicial Conference, the United States Judicial Conference, the Office of Management and budget, the appropriations Committees of the House and Senate, the United States Congress, and the President. Given this degree of scrutiny and oversight with respect to the appropriation for defense services provided under the CJA, we believe that an additional procedure which would delay the implementation of new rates in order to allow the Congress time "to determine the reasonableness of any such increases" would be redundant and unnecessary.

* * *

Sincerely,

/s/ William E. Foley
Director

Enclosure

APPENDIX 7